Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAMES KNISKERN, et al.,
Petitioners,

v.

RON AMSTUTZ, et al.,
Respondents.

On Petition for Writ of Certiorari
To the Ohio Supreme Court & Ohio Court of Appeals,
Eighth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the Respondents so far exceeded the bounds of their legitimate legislative authority by passing legislation that mooted Petitioners' cases against the State & its political subdivisions pending before the Ohio Supreme Court, when Respondents voted for and enacted Am.Sub.H.B. No.350, that was adjudicated in Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451 (1999), to have usurped the judicial authority of the State, -- was found to have violated the separation of powers doctrine, -- was found to have violated Ohio's Constitution one subject rule, and -- was found to be unconstitutional "*in toto*", so as to render Respondents liable in their individual capacity to Petitioners in damages, presumed or otherwise, under 42 U.S.C. § 1983, and thereby preclude an absolute immunity summary judgment in Respondents' favor ?

II

Whether Respondents are subject to 42 U.S.C. § 1983 liability to Petitioners, for having mooted Petitioners' cases against the State & its political subdivisions, with legislation that usurped the State's judicial authority, that impaired the State's of Ohio's statutory, unilateral contract in R.C. § 2743.02(A)(1), with Petitioners, in violation of Article I § 10 of the U.S. Constitution, wherein the State promised the Petitioners, that upon their filing of their action against the State in the Ohio Court of Claims, and waiving all their rights against State personnel, the State in turn agreed to have its liability determined in accordance with the same rules of law applicable to suits between private parties and waive its immunity from liability and consent to be sued?

QUESTIONS PRESENTED (continued)

III

Whether Respondents' judicial removal of the State of the Ohio Supreme Court's constitutional jurisdictional authority, Article IV, § (2)(B)(2)(e), to hear or otherwise grant a discretionary appeal upon issues of public or great general interest, from Petitioners' pending Memorandum, by mooting the statutory predicate in Petitioners' tort case against the State & its political subdivisions that otherwise jurisdictionally qualified for the discretionary appeal, with legislation adjudicated to have usurped the judicial authority of the State, subjects Respondents to liablity in their individual capacity to Petitioners in their 42 U.S.C. § 1983 damage action, pursuant to the Petitioners' federally protected rights under the 14th Amendment § 1, Due Process & Equal Protection clause to the U.S. Constitution and under the Separation of Powers Doctrine ?

IV

Whether Petitioners' were subject to restraint of their right to speak by being prohibited from making extra judicial statements during the appellate process of their 42 U.S.C. § 1983, case by Ohio's Disciplinary Rules, DR 7-107(A), contrary to Petitioners' U.S. First Amendment right of free speech and to Petitioners' speaking remedy authorized in Bogan v. Scott Harris, 523 U.S 44, (1998) "to vote them out of office", as a consequence of the voidable, summary judgment opinion, that attacked the informational validity of Petitioners' Complaint against Respondents, rendered by the visiting judge, acting outside the adjudicating authority of the Cuyahoga County Common Pleas Court's Local Rule 15(B), so as to remove Petitioners' right to legitimately rely upon their Complaint as qualifying as and exception under DR 7-107(B)(2), as "information contained in a public record"

QUESTIONS PRESENTED (continued)

V

Whether the State of Ohio subjects itself to 42 U.S.C § 1983 liability and becomes a party defendant to the cause it is defending by waiver or otherwise, by denying Petitioners their right to adjudicate their 42 U.S.C. § 1983 suit in State Court against Respondents, sued in their individual capacity, in accordance with federal law and 14th Amendment constitutional principles of due process and equal protection, when the Attorney General, of Ohio, following the Sheward, adjudication, supra, without filing a Motion to Intervene in accordance with Civil Rule 24, and without reserving the State's sovereign immunity, compelled by R.C. § 109.02, enters a general appearance in the State's Common Pleas Court, by filing answers to the Complaint and by objections to interrogatories conceals the identity of the Lobbyists on behalf of the Respondents, contrary to Hafer v. Melo Jr., 502 U.S. 21 (1991) that prohibits the use of the State treasury funds in Respondents' defense, when R.C. § 109.02 makes any judgment Petitioners obtain voidable because Respondents are denied their Due Process right to their own counsel and the Courts below deny Petitioners' seasonable Motion to Strike the Attorney General's answers?

VI

Whether the State in its defense of the Respondents to Petitioners' 42 U.S.C. § 1983 litigation of their case, co-opted Respondents' ultra vires acts and committed constitutional torts against Petitioners for which damages must be presumed?

QUESTIONS PRESENTED (continued)

VII

Whether, S.B. 108, by its nexus and inherent nature as reviving, remedial, legislation to repealed Am.Sub.H.B. No. 350, prima facie violates Ohio Constitution's one subject rule, and represents a continuous usurpation of judicial power depriving Petitioners of their U.S 14th Amendment Due Process and Equal Protection rights applicable to 42 U.S.C § 1983 cases tried in State Courts, -- both as a consequence of depriving the Petitioners of their jurisdictional predicate in their Motion For Reconsideration of their Memorandum for a discretionary appeal in their § 1983 case -- and depriving the Ohio Supreme Court of its jurisdiction under Ohio Constitution's Article IV, § 2(B)(2)(e) to grant it, -- through the disqualification of Petitioners' legal standing in Sheward, to challenge such legislation, as unconstitutional and as a usurpation of judicial authority under Ohio Constitution's one subject rule?

LIST OF PARTIES

PETITIONERS:
James Kniskern, Individually and as Administrator of the Estates of Cynthia Ann Cavaliere, Jennifer Kniskern and Felina Cavaliere;

Guy Cavaliere M.D.;

Joanna Cavaliere, a Minor, by and through their Father and Natural Guardian, Guy Cavaliere

Maria Cavaliere

RESPONDENTS:
The following defendants are sued in their individual capacity for their actions as STATE REPRESENTATIVE of the OHIO HOUSE OF REPRESENTATIVES of the 121st GENERAL ASSEMBLY OF OHIO:

Ron Amstutz
William Batchelder
Samuel T. Bateman
Ann Womer Benjamin
Louis W. Blessing Jr.
Charles R. Brading
Jim Buchy
John A. Carey Jr.
Gary Cates
Robert L. Corbin
Edward K. Core
Rex A. Damschroder
Jo Ann Davidson
John G. Garcia
Randall Gardner
Diane V. Grendell

Joseph E. Haines
Bill Harris
Richard A. Hodges
Ron Hood
Jay Hottinger
Thomas W. Johnson
Jim Jordan
Edward F. Kasputis
Gene Krebs
Joan W. Lawrence
Jerome F. Luebbers
James W. Mason
Priscilla D. Mead
Kerry Metzger
Jon D. Myers
Robert E. Netzley
Jacuelyn K. O'Brien
Lynn Olman
Joy Padgett
Sally A. Perz
Twyla Roman
Amy Salerno
Frank S. Sawyer
William Schuck
Robert L. Schuler
J. Kirk Schuring
Raymond E. Sines
Dennis Stapleton
William Taylor
George Terwilleger
E.J. Thomas
William E. Thompson
Patrick J. Tiberi
Dale N. Van Vyven
Rose Vesper

Lynn Wachtmann
Cheryl J. Winker

The following defendants are sued in their individual capacity for their actions as STATE SENATOR of the OHIO SENATA of the 121st GENERAL ASSEMBLY OF OHIO:

Stanley J. Aronoff
James Carnes
Robert R. Cupp
Navy Chiles Dix
Grace L. Drake
Richard H. Finan
M. Ben Gaeth
Charles F. Horn
Janet C. Howard
Bruce Johnson
Merle Grace Kearns
Scott R. Nein
W. Scott Oelslager
Roy L. Ray
Richard P. Schafrath
Gary C. Suhadonik
Eugene J. Watts
Doug White
Steven Yarbrough

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The opinion dated June 27, 2001 of the highest state court to review the merits is The Ohio Court of Appeals, Eighth Appellate District. It appears at Apdx A pg. 1. It is reported in 144 Ohio App.3d 495, 760 N.E.2d 876. The unreported Opinion and Journal Entry of the Ohio Cuyahoga County Court of Common Pleas, dated July 24, 2000, appears at Apdx. C, pg. 12.

STATEMENT OF JURISDICTION

The date on which the highest state court decided Petitioners case was The Ohio Supreme Court Journal Entry declining jurisdiction dated October 24, 2001, and reported in 93 Ohio St.3d 1458, 756 N.E.2d 1235, and appears in Apdx. D, pg. 23.

A timely petition for rehearing was thereafter denied on the December 5, 2001, and reported in 93 Ohio St.3d 1499, 758 N.E.2d 1149, and appears in Apdx. E, at pg 25.

The jurisdiction of this Court is invoked under Article III, Section 2 of the U.S. Constitution,. The

jurisdiction of this Court is also invoked under 28 USC § 1257(a) by virtue of 42 U.S.C. § 1983, a statute of the United States being drawn into question involving Petitioners' federally protected U.S. constitutional rights accruing thereunder, including but not limited to the First Amendment; the Fifth Amendment as incorporated into the Fourteenth; the Due Process & Equal Protection of the Fourteenth Amendment; Article I, § 10 ; Article III § 2, and Article IV § 2 of the United States Constitution.

The Ohio Supreme Court denied on December 5, 2001, Petitioners' application for reconsideration of their Memorandum in Support of Jurisdiction and entered it in the Court's journal. The judgment order of the Ohio Supreme Court declining Petitioners' Memorandum in Support of Jurisdiction was entered on the Court's journal October 24, 2001. The Court of Appeals of Ohio, Eighth Appellate District decision affirming the Common Pleas Court's summary judgment in favor of the Respondents became final when it denied Petitioners' Motion for Reconsideration that was received for filing by its Clerk on June 27, 2001.

Petitioners deem it necessary to detail the arbitrary actions of the State as a jurisdictional predicate because Petitioners' 42 U.S.C § 1983 case is based upon their tort case against the State and its political subdivisions previously adjudicated against Petitioners for which "there is no federal interest save and except an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational". Martinez v. California, 444 U.S. 277, 62 L Ed2d 481 at 487, 100 S Ct 553 (1980), recognizes a discernible federal interest in protecting the individual citizen from state action that is wholly arbitrary or irrational by stating:

> "the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process

> Clause" and ".. the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) at pg. 79, states " "It has long been established that a state constitutional provision is a "statute" within the meaning of § 1257(2)" and "Appeal is thus the proper method of review."

Petitioners as Ohio and U.S. citizens contend that the adjudication by the Ohio Supreme Court in its syllabi 2 & 3 in the case of Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999), of legislation Am.Sub.H.B. No. 350, as having usurped the judicial authority of the State, brings Petitioners' 42 U.S.C. § 1983 case within the ambit of wholly arbitrary or irrational state action for which this Court has jurisdiction. Syllabus 2 states:

> "Am.Sub.H.B. No. 350 usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers and, therefore, is unconstitutional."

Syllabus No. 3 states:

> "Am.Sub.H.B. No. 350 violates the one-subject provision of section 15(D), Article II of the Ohio Constitution, and is unconstitutional *in toto*."

Petitioners contend that this Court's jurisdiction is invoked by the arbitrary judicial action of the state legislator Respondents' mooting Petitioners' case against the State, by having usurped the judicial authority of the State in their enactment of Am.Sub.H.B. No. 350 in October 1996. This occurred at a time when Petitioners' wrongful death and

personal injury actions against the State and its political subdivisions were pending on Petitioners' Memorandum in Support of Jurisdiction in the Ohio Supreme Court.

In support of this Court's jurisdiction by State arbitrary judicial action Petitioners say, that the Respondents mooting of Petitioners case by the enactment of Am.Sub.H.B. No. 350 removed their statutory predicate that jurisdictionally qualified Petitioners' pending Memorandum in Support of Jurisdiction as issues of "public or great general interest" under the Ohio Supreme Court's authority to grant a discretionary appeal, delegated to it by Article IV, § 2(B)(2)(e) of the Ohio Constitution. It was arbitrary to Petitioners because of their Ohio constitutional right under that Article IV to an unfettered discretionary appeal opportunity as part of the Due Process afforded litigants in Ohio Courts by the State of Ohio when the State was a party to the litigation. Petitioners' case was statutorily protected from mooting by Respondents' ultra vires legislative acts by the operation of R.C. § 2743.02(A)(1) and by Article I § 10 of the U.S. Constitution. Petitioners case jurisdictionally qualified for a discretionary appeal and was winnable.

Respondents' removal of Petitioners' jurisdictional statutory predicate while the State was a party, "de facto", decided Petitioners' case arbitrarily. As such it is plainly a "judicial act" by Respondents. The Ohio Supreme Court, under Ohio Civ. R. 44.1(A)(1) & Civ. R. 1(A), is compelled to take judicial notice of the enactment, of Am.Sub.H.B. No. 350, with Petitioners case before it, regardless of the fact the bill was to have prospective application. The Court could only conclude under the presumptions of constitutionality and regularity, that Petitioners' statutory predicate was no longer law and did not qualify jurisdictionally as a case of public or great general interest. Thereafter the Court declined to take jurisdiction of Petitioners' case.

Am.Sub.H.B. No. 350's, tort reform, attempted to

overrule the judicial declarations of unconstitutionality by the Ohio Supreme Court in the First Tort Reform Act. Sheward, supra, at 86 Ohio St.3d page 492. Yet at the same time it made the State and its political subdivisions the beneficiary of having Petitioners' case unilaterally decided by Respondents'.

Those Respondents still serving as incumbents following the June 27, 2001 Court of Appeals decision in their favor in this case, revived and enacted in July 2001, in S.B. 108, all the statutes retrospectively relating back to immediately before their enactment of Am.Sub.H.B. No. 350 that had been knocked out as a result of the Sheward, decision supra. It mooted Petitioners' chance for an Ohio Supreme Court discretionary appeal of their §1983 case.

S.B. 108 represents a continuation of arbitrary State legislative conduct because approximately the same number of statutes are revived in S.B. 108 that have been found to have violated the one subject rule of Ohio's Constitution in the Sheward, case, supra, with respect to Am.Sub.H.B. No. 350. It is therefore a continuation of the usurpation of the judicial authority of the State. As such it is beyond legal challenge by Petitioners, as discussed in Sheward, supra.

Petitioners' contend they are protected from this arbitrary State action, by the U.S. Amendment XIV's. Due Process & Equal Protection. That they have both fundamental substantive and procedural constitutional rights to obtain redress from the Respondents in their individual capacity that have damaged them with their ultra vires legislative acts constituting State action; and from the State that has co-opted those acts in Petitioners § 1983 case.

The above co-opting State action involves, inter alia., a violation of the separation of powers doctrine by the State's failure to statutorily and judiciously adjudicate Petitioners § 1983 action against Respondents that is part and parcel of the arbitrary action under which this Court has

jurisdiction. The Attorney General violated the separation of power in representing Respondents' sued in their individual capacity after it was adjudicated that Respondents legislation was ultra vires. The Attorney Generals representation pursuant to Ohio State statute R.C. § 109.02 is repugnant to 42 U.S.C, § 1983. It is repugnant to this Courts decision in Hafer, supra, and the Due Process & Equal Equal Protection of the U.S. Fourteenth Amendment, once Sheward supra established that the legislation usurped the judicial authority of State. This, plus the judicial decisions and procedures in this case represent a substantial departure from the settled procedural and substantive law of the State in denying § 1983 relief to Petitioners after Petitioners had seasonably noted those departures and asserted the recognized law of the State. This makes it patent that the State has co-opted Respondents' ultra vires acts in violation of the separation of powers doctrine and have acted arbitrarily in this case..

R.C. § 109.02 is repugnant because it makes Petitioners' litigation of 42 U.S.C. § 1983 untenable in State Courts for the additional reason that any judgment obtained by Petitioners is hollow and voidable by being subject to Respondents well taken, but unstated implied Due Process defense that Respondents were denied the right to select their own counsel while being sued individually.

The Court's jurisdiction is invoked in protecting the individual citizen from state action that is wholly arbitrary or irrational by virtue of Respondents' nullification of the operation of Ohio State statute, R.C. § 2743.02 as being repugnant to Article I § 10 of the U.S. Constitution when Respondents' legislation usurped the State's judicial authority, mooting Petitioners' litigation thereunder.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Article I § 10 at Apdx. F, pg. 27;

Article IV § 2; at Apdx. F pg 28; Article III, § 2 at Apdx. F, pg 27; the First Amendment at Apdx. F. pg. 28; the Fifth as incorporated into the Fourteenth Amendment § 1, at Apdx. F. pg. 28; and the Fourteenth Amendment itself to the U.S. Constitution, Apdx.F pg. 29; Ohio State Constitution Article I, § 16, & Article IV § 2(B)(2)(e) at Apdx H pg. 29; and The Separation of Powers Doctrine.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983, at Apdx G pg. 33; Ohio R.C. § 2743.02(A)(1),. at Apdx I pg. 41; R.C § 2744.02(B)(3); & R.C. § 2744.03(E)(1), at Apdx I pg. 45; R.C. § 5535.15, § 5591.36 & § 5591.37, at Apdx I pg. 48; R.C § 109.02; Apdx I pg 25; Disciplinary Rules DR 7-107(A) & DR 7 107(B)(2) at Apdx. M pg 86; Am.Sub H.B. No. 350 at Apdx. J pg 51; S.B. 108, at Apdx. K pg. 75; Ohio. St.. Constitution Article IV § 2(B)(2)(e) & Ohio St. Constitution Article I § 16 at Apdx. H pg.35.

STATEMENT OF THE CASE

Petitioners sued the State in its Court of Claims for wrongful deaths and personal injuries they sustained in a one van, motor vehicle, guard rail accident on interstate highway I-70, on the basis that the guard rail constituted a nuisance. Summary judgments were granted to the State in Case No. 95AP 109-1164 and its political subdivisions in Case No. 95AP109-1169. Those case were affirmed on appeal. reported in Kniskern v Somerford Twp. 112 Ohio App.3d 189, 678 N.E.2d 273 (June 28, 1996). The Ohio Supreme Court declined jurisdiction to grant a discretionary appeal on December 20 1996, reported in 77 Ohio St.3d 1485 , 673 N.E.2d 145; and denied Petitioners' Motion for Reconsideration on January 29, 1997, reported in 77 Ohio

St.3d. 1549, 674 N.E.2d 1187. This Court, thereafter, also declined jurisdiction in case No. 96 – 1729.

After the Sheward decision supra, Petitioners filed this, their 42.U.S.C § 1983 case, in the Common Pleas Court of Cuyahoga County. The federal questions were raised in Petitioners' Complaint of 128 paragraphs that appears in the Apdx. O at pg 91. Petitioners raised additional federal questions by filing their Motion to Strike the Answers of the Attorney General, filed on behalf of the state legislator Respondents, sued in their individual capacity on the authority, inter alia., of Hafer v Melo, Jr., infra. Petitioners responded with legal arguments to Respondents' Motion for Summary judgment but moved the Court for leave of Court in order to obtain authenticated evidentiary materials lawfully necessary to negate a summary judgment motion.

Suddenly and unexpectedly, without notice or docket entries of reassignment, and contrary to the Court's own rules, a visiting judge granted summary judgment to Respondents and denied all of Petitioners' motions. Petitioners filed their objections to the visiting judge deciding the case and filed a notice of appeal. Those objections were renewed in Petitioners' Court of Appeals briefs and Petitioners' Assignment of Errors. The Court of Appeals found Petitioners' claims meritless; found that absolute immunity carried the day; did not address Petitioners' assignment of errors; affirmed the summary judgment; and remanded the case for the assessment of attorney fees sought by the Attorney General under a harassment statute repealed by the Sheward decision, supra, that was subsequently to be revived in July 2001; following the Appellate Court's June 27, 2001 denial of Petitioners' Motion for Reconsideration. (See S.B. 108 reviving 2323.51 at Apdx. K, pg. 76). Petitioners' Memorandum in Support of Jurisdiction to the Supreme Court of Ohio was denied, as was Petitioners' Motion for Reconsideration, wherein they

asserted that S.B. 108 was a continuing usurpation of the judicial authority of the State.

This case has a complex constitutional tort scenario requiring a rather detailed factual context to be understood.

The State of Ohio in 1970 acted through its Ohio Department of Transportation, (hereinafter ODOT), an agency of the State of Ohio, and built a bridge on Interstate Highway 70, at Deer Creek, with federal funds. ODOT installed as part of the bridge, a cement wing wall abutment, at right angles, ninety degrees perpendicular to the horizontal that formed a wash bank. It descended eight feet down to the creek 15 feet below. ODOT designed, attached and maintained the unsuitable guardrail to that bridge. The guardrail was unsuitable because it was built with a flawed guardrail design, known to ODOT at the time of construction, that permitted vehicle access to the wash bank and the creek below by the motoring public. It constituted a constructive nuisance at law in Petitioners' 1992 accident.

Ohio statutes provided for County liability for damages at the accident site guardrail that was caused by unsuitable guardrails at wash banks at County bridges, R.C. § 5591.36 & R.C. § 5591.37. ODOT entered Madison County and in 1970 built the accident site guardrail, using ODOT's own design drawings it had previously cancelled as obsolete, prior to the beginning of construction. ODOT ignored the safer standard construction design guardrail drawings it had adopted, that provided more curvature and setback, that made it impossible for the motoring public to access from I-70, the bridge's cement wing wall abutment, its wash bank, and the creek below. At the same time ODOT was constructing guardrails at an adjacent similar bridge on I-70, using these newly adopted standard drawings. ODOT from that day to this has retained sole control of the I-70 interstate highway.

This accident site guardrail was so unsuitable and

was a treacherous nuisance because it permitted vehicle access to the cement wash bank immediately behind the guard railing from I-70. Ohio statute R.C. § 2744.02(B)(3) delegated to its political subdivisions the duty to keep public roads, bridges or public grounds within the political subdivisions open, in repair, and free from nuisance attaching liability for injury, death or loss to persons for their failure to do so.

The fact that the guardrail permitted vehicle access to the cement wash bank immediately behind the guard railing from I-70 was one of the proximate causes of Petitioners' damages. Petitioners' driver, in 1992 traveling at 60 m.p.h., 88 feet a second, was able within three second from leaving the I-70 roadway to drive to and find the cement wingwall at the bridge in his sudden, unexpected loss of consciousness and/or sleep, and crash into the creek's far wash bank, leaving no skid marks.

Petitioners' suits against the State and the political subdivisions were dismissed by an adjudication of summary judgment in favor of the State and political subdivisions in the Court of Claims on the basis that the driver in which Petitioners were riding was the sole cause of the accident, notwithstanding that Petitioners' evidence had showed, that had the guardrail been built in accordance with ODOT's standard design drawings in place at the time of construction, as was an adjacent bridge guardrail, the vehicle in which Petitioners were riding would have been redirected back on to the highway rather than launched into and across the creek onto its far wash bank.

The State, which functions corporately, was liable to Petitioners on the legal doctrine of principal agent because it delegated to its political subdivisions, statutory liability for unsuitable guardrails and maintaining a nuisance on public roadways. ODOT retained control of I-70 and the political subdivisions did no maintenance or fixing of it other than to

exercise their police power on the highway.

The adjudication was arbitrary because the summary judgment was granted in favor of the government with no showing that the driver was either intentional or negligent in his sudden, unexpected loss of consciousness, other than his speculative statement guess that he must have suddenly and unexpectedly fallen asleep at the wheel during that short period of time, when such a statement is not subject to memory. It was also arbitrary because the Ohio Supreme Court had held the question of whether the guardrail constituted a nuisance and was close enough to the highway to impose a duty under the statute are fact questions. See Adkins v Village of Ontario, 8 Ohio St.3d 45, 457 N.E.2d 317 at pages 319-320 (1983)

It became arbitrary by the Court of Appeals' affirming the Court of Claims' judgment, by continuing to apply the State's judicially created case law of liability that stems from the State's sovereign immunity exception created by the judiciary prior to the establishment of the Court of Claims in 1975. This case law limited the State's liability to accidents occurring only upon the highway, itself. It rejected the settled principal agent law principles that are supposed to operate as the controlling rule of law applicable to suits between private parties pursuant to. R.C. § 2743.02(A)(1).

The law applicable to private parties is premised on the notion that each person is liable for his, her, or its own torts. This legal doctrine plainly makes the State, a principal, liable for the acts of its political subdivisions agents, to whom it delegates duties, that the State otherwise would ordinarily be liable for, when those agents by omission or commission, negligently carry out those duties. However, because the State has reserved its sovereign immunity as to its political subdivisions the sovereign those sovereign immunity cases strictly construing their liability

because they are an exception to the common law has allowed the law of those cases to be adjudicative. Petitioners original case against the political subdivisions was filed in the Common Pleas Court of Cuyahoga County and by the State's special venue statute removed to the Court of Claims to be adjudicated with Petitioners' case against the State. The Courts below then arbitrarily applied the law applicable to the political subdivisions to Petitioners' case against the State.

Ohio statute R.C. § 2744.02(B)(3), delegated to its political subdivisions the duty to keep public roads, bridges or public grounds within the political subdivisions open, in repair, and free from nuisance attaching liability for injury, death or loss to persons for their failure to do so. How could a State under the rule of law applicable to suits between private parties not be liable, as a matter of law, so as to warrant a summary judgment in its favor?

These issues were covertly intertwined in Petitioners' case. The Respondents avoided this confrontation and patent liability, by legislation that usurped the judicial authority of the State. Petitioners have no legal standing to challenge it, or otherwise overcome the presumptions of constitutionality and regularity that their legislation is imbued with, by law. They mooted Petitioners case by legislatively removing Petitioners' statutory predicate that jurisdictionally qualified their Memorandum in Support of Jurisdiction for a discretionary appeal.

Petitioners' §1983 case, in Count I of their complaint, sued Respondent legislators, in their individual capacity, in the State Common Pleas Court for money damages under 42 U.S.C. § 1983, for Respondents' unconstitutional acts and ultra vires, judicial acts stemming from their enactment of the tort reform act, Am.Sub.H.B. No. 350. That bill mooted Petitioners' legal right to seek reversal of their cases pending before the Supreme Court of

Ohio on Petitioners' Memorandum in Support of Jurisdiction for a discretionary appeal. Their cases were otherwise winning and meritorious wrongful deaths and personal injury actions against the State and its political subdivisions. It deprived Petitioners of their rights to a meaningful hearing at a meaningful time under the Due Process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution.

Petitioners alleged in Count II of the complaint, paragraph 117 et seq., in substance, after incorporating the allegation in Count I as though fully rewritten, that Respondents were lobbied by party defendants John Does I, whose principals were John Does II. John Does III are those persons that funded John Does I and John Does II. Each are named as party defendants in the caption with identities and addresses unknown to Petitioners.

They are alleged to have acted in concert with Respondents knowing that when they lobbied the Respondents, that there was a reasonable legal probability that the legislation would subsequently be held, as a matter of law, to be unconstitutional. It was further alleged, that but for, the successful lobbying efforts of John Does I, II and II, the Respondents would not have enacted Am.Sub.H.B. No. 350. That then Petitioners would have received the due process type of hearing on their Memorandum in Support of Jurisdiction from the Supreme Court of Ohio that they were otherwise entitled to.

Petitioners sued the lobbyists and their principals that had lobbied for the legislation usurping judicial authority, as being jointly and severally liable with the Respondents for Petitioners' damages. Petitioners' legal theory is that while the U.S. Constitution protects Respondent Lobbyists' right to petition their government, it does not protect them, when they have either sought or obtained legislation that usurps judicial authority of the State.

The fact is that after Sheward (1999), supra, decision, the Respondents did not, forthwith, enact any remedial legislation, notwithstanding that this decision divested the State of some of its police power previously delegated to municipalities of the authority to maintain streets and roadways free from nuisance. Circumstantially it creates the inference that the lobbyists had engaged in "no fault lobbying" where the lobbyists obtain their legislative goals win or lose, by making a deal with the state Respondents by agreeing not to remediate the lobbied for legislation, if it in fact fails to pass constitutional muster. The judicial authority of the State has remained usurped and still remains usurped from October 1996 to the present time. S.B.108 enacted in July 2001, to restore the status quo, only serves to continue the usurpation because it violates the one subject rule of the Ohio Constitution by its nexus to Am.Sub.H.B.No.350.

The State's Attorney General entered a general appearance in Petitioners' § 1983 case by filing answers on behalf of the state Respondents that were sued in their individual capacity. The answers admitted that Respondents had acted under color of law with respect to Petitioners' allegations. Those answers were filed without first filing a motion to intervene as required by the Ohio Rules of Civil Procedure 24. Petitioners' filed a Motion to Strike the answers the Attorney General had filed on behalf of the Respondents, relying on the authority of Hafer v. Melo, Jr., supra, for the legal authority that the State treasury is not to be used for the defense of senior officers of the state sued in their individual capacity. This issue remained undecided, until the Court granted the Attorney General's Motion for Summary Judgment in which all of Petitioners' Motions were denied. Petitioners had responded to the Summary Judgment with a brief on the law, but at the same time moved for leave to obtain the supporting documents in

affidavit form as required by law to rebut the Motion for Summary Judgment in the event their partial legal response was insufficient to defeat that Motion. The Summary Judgment was granted in favor of Respondents. Petitioner Motion for Leave was denied. Petitioners' interrogatories served with the complaint seeking the identities of John Does I, II and II, remained unanswered. The Attorney General Attorney objected to answering those interrogatories. Petitioners' citation of controlling federal authorities evidencing that the objections were not well taken did not convince the Court.

Petitioners' complaint filed in State Court was subject to removal to federal court by any of the named party defendants. It is therefore an extremely detailed pleading because the federal Sixth Circuit Court of Appeals requires it in a § 1983 case. All of the 128 paragraphs of allegations are in the appendix starting at Apdx. O pg. 91. Omitted therefrom are Exhibit A and B attached to the complaint.

Exhibit A is a proposed bill that was drafted by the Ohio Legislative Service at the request of Diane Grendell, State Representative in the District where Petitioner James Kniskern resides. That was to be introduced in the General Assembly with a predicate that formed the underpinnings of Petitioners moral claim their counsel was pursuing. Counsel was unsuccessful in getting it introduced to the General Assembly. Exhibit B is Petitioners' Petition for a Writ of Certiorari docketed in this Court as Case No. 96-1729, on May 1, 1997, seeking this Court's review the Petitioners' wrongful death and personal injury cases against the State and its political subdivisions that was mooted by Am.Sub.H.B. No 350.

Petitioners incorporate by reference their Complaint as a further Statement of the Case as it appears in Appendix O. Inasmuch as Petitioners' Statement Of Jurisdiction, supra, contains Statement of the Case material, Petitioners

incorporate it by reference as further Statement of the Case.

Petitioners' Assignment of Errors and the collateral issues filed in the Eight Appellate District are in Apdx. P & Q starting at pg.129. They along with the Complaint and Petitioners' Motion for Reconsideration In the Supreme Court of Ohio, (Apdx R pg. 141), demonstrate that Petitioners issues are duly seasonable and appropriately raised below.

The State Judiciary prohibits Petitioners in its disciplinary rules, the right to discuss the legal and factual issues with the media, while pursuing their § 1983 case in the State Courts. In Bogan v. Scott-Harris, 523 U.S. 44 (1998), this Court in granting absolute legislative immunity to local legislators, stated that no actionable legal remedy was available against those legislators, but that those aggrieved, had the right to vote the legislators out of office.

Petitioners contended in the Court of Appeals that Bogan, supra, was a "speaking remedy" protected by the First Amendment to the U.S. Constitution. It was a "speaking remedy" because legislators cannot be voted out of office without disclosing and speaking your legal and/or political grievances against them. The voidable, summary judgment opinion in favor of Respondents, was rendered by the visiting judge's, acting outside the adjudicating authority of the Common Pleas Court's Local Rule 15(B). The Court of Appeals sustained this transfer of the case to a visiting judge over Petitioners' timely objections made in accordance with the Court's, controlling and settled case law, cited by Petitioners, that makes such a decision voidable. See Berger v Berger 3 Ohio App.3d 125, 443 N.E.2d 1375 (1981).

The voidable summary judgment opinion took umbrage with Petitioners' Complaint stating :

> 'The claims and faulty legal reasoning spread upon volumes of paper pages filed by Plaintiffs in this case come as close to "frivolous" as one can imagine. The

> complaint itself (49 pages plus 52 pages of exhibits violates Civ. 8 and could be subject to an order striking it from the file. It will be remembered for its prolixity, not for its substance."

See Complaint in Apdx. O pg. 91.

It is contended that this judge's voidable opinion placed the factual information contained in the allegations in Petitioners' complaint in a false light and in a cloud of doubt, as to whether the statements and averments would qualify or constitute, "information contained in a public record ", pursuant to DR 7 107(B)(2), as an exception to DR 7-107(A). It placed a restraint on Petitioners' right to speak, in that Petitioners were otherwise prohibited by Disciplinary Rules DR 7-107(A), during court litigation, from going to the media with the issues of the case. The Court of Appeals ignored this issue raised by Petitioners and made no accommodation so as to comply with Bogan, supra, and further restrained Petitioners' right to speak by remanding the case for attorney fees sought below, notwithstanding that Petitioners had made that Court aware, that the statutory predicate, R.C. § 2323.51, for those attorney fees that the Attorney General had filed for, had been repealed by the Sheward decision, supra. S.B. 108 revives R.C. § 2323.51. Apdx. K pg. 76.

The Courts below deprived Petitioners of their speaking remedy, authorized in Bogan, supra, in the litigation of their § 1983 action and protected under the First Amendment of the U.S. Constitution. The remand for attorney fees under a repealed statute deprived Petitioners of their U.S. First Amendment right to petition their government and denied them the Equal Protection of the law under the Fourteenth Amendment to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

It is of national importance for this Court to adjudicate the questions of first impressions presented in this 42. U.S.C. § 1983, case against the Respondent state legislators, sued in their individual capacity, where the judicial authority of the State has been adjudicated as having been usurped by the Am.Sub.H.B. No. 350, legislation Respondents enacted in 1996. The State's judicial authority continues to be usurped by incumbent Respondents' tardy, remedial, reviving legislation, S.B. 108, enacted in July 2001, which is in violation of the same one subject rule it was intended to remedy. This legislation is causing, and will continue to cause into the indefinite future, irreparable harm and damage to the State's judicial system and those served by the State tort law. No adequate, adjudicated remedy at law or equity presently exists.

Petitioners' case presents the issue, inter alia., as to whether Respondents' legislative mooting by ultra vires usurpation of the State's judicial authority, ripens into a "judicial act" and subjects them to a 42 U.S.C. § 1983 liability in their individual capacity, for violating Petitioners' rights under the Separation of Powers Doctrine, the U.S. 14th Due Process, and Equal Protection clauses, and Article I § 10 of the U.S. Constitution, where the State is a party to the proceedings and statutorily committed to have its liability adjudicated in accordance with the rule of law applicable to suits between private parties. Conceivably it may be a taking of private property for public use, without compensation by Amendment V incorporated into the 14th.

As a matter of State law, an ordinary citizen does not have legal standing to challenge ultra vires legislative acts that usurp the judicial authority of the State. See Sheward opinion, supra. The vested legal rights of persons changed by that legislation are irreparably damaged by such ultra

vires legislative acts, for which they have no adequate remedy at law or equity. Justice Black in his concurring opinion in Tenney v Brandhove 341 U.S. 367 at pg. 379 (1951) confirming the Court's holding in that case stated:

> "The Court's opinion also points out that Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act."

Am.Sub.H.B. No. 350 has been adjudicated to usurp the judicial authority of the State. This is that point at which the Respondent legislators' conduct so far exceeds the bounds of legislative power that they may be held personally liable in a suit brought under the Civil Rights Act. This Court has yet to decide this issue in a factual context where the State Court adjudicates legislation to be a usurpation of the State's judicial power.

A Writ of Certiorari should issue to settle this issue of first impression as to whether the Respondents' enactment of legislation that is adjudicated to usurp the judicial authority of the State, is an act within the legitimate sphere of Respondents' legislative duties, as a matter of law? The case of Doe v. McMillan (1972) 412 U.S. 306 at pg. 319, 93 S. Ct. 2018 at pg. 2028, 36 L.Ed2d 912 states:

> .....The scope of immunity has always been tied to the scope of ... authority' Wheeldin v. Wheeler, 373 U.S. 647, 651, 83 S. Ct. 1441, 10 L.Ed2d 605 (1963). In the legislative context, for instance, '(t)his Court has not hesitated to sustain the rights of private individuals when it found Congress

> was acting outside its legislative role' Tenney v. Brandhove, supra, at 377 of 341 U.S., at 788 of 71 S.Ct. Thus we have recognized 'the immunity of legislators for acts within the legislative role,' Pierson v. Ray, supra, 386 U.S., at 554, 87 S.Ct., at 1218, but have carefully confined immunity to protect only acts within the 'sphere of legitimate legislative activity.' Tenney v. Brandhove, supra, 341 U.S., at 376, 71 S.Ct. at 788; cf. Powell v. McCormack, supra.

Petitioners contend that the summary judgment granted Respondents below is wrongfully decided as a matter of law. It sets a legal precedent that is disastrous to our legal system. Once a court declares legislation to have usurped the judicial authority of the state, the legislators that enacted that legislation are deemed at law to have committed an ultra vires act for which they are personally liable to those damaged by it in a § 1983 action. They are and should be judicially estopped from denying it by legal counsel of their own choice, other than the Attorney General.

Incumbent Respondents' remedial, reviving legislation, S.B. 108, with its nexus to Am.Sub.H.B. No. 350, prima facie, is a continuation of the usurpation it purports to correct. This is because it inherently contravenes the one subject rule of the Ohio Constitution that Sheward found to be applicable to Am.Sub.H.B. No. 350. This legislation is a direct attack on the citadel of Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803), for the purpose of establishing the legislature as the final arbiter of the law.

The State's Chief Justice in a concurring opinion stated: "This case presents a perfect example of the chaos resulting from Sheward". See Stevens v Ackman et al. 91 Ohio St.3d 182 at pg. 196, 743 N.E.2d. 901 at pg. 912

(2001). His statement makes it plain that State's judicial system has been adversely affected, notwithstanding the Court's attempt to navigate the treacherous waters the Respondents' ultra vires acts caused. Three months following the Stevens decision, supra, S.B. 108 was enacted, coincidentally after the Court of Appeals had rendered its decision in the case sub judice.

The over arching arbitrary power of the State to invoke ultra vires legislation with impunity, to suit its convenience, subverts its obligation to submit to suit by claimants in the State's legislatively created Court of Claims, pursuant to the Ohio Constitution's Bill of Rights, Article I § 16. This is patent in Petitioners' Court of Claims case, the subject of this § 1983 action, whereby the legislative usurpation of the judicial power of the State was used as a mooting tool, for the purpose of denying Petitioners an opportunity for a discretionary appeal to the Ohio Supreme Court, by nullifying their statutory predicate that Petitioners were relying upon jurisdictionally. The mooted statutes deprived the Ohio Supreme Court of its jurisdiction to grant Petitioners a discretionary appeal under the Ohio Constitution Article IV § 2(B)(2)(e), by removing Petitioners' otherwise jurisdictionally qualifying issues, as issues of public importance or great general interest, necessary for a discretionary appeal.

That arbitrary power was sufficient to deprive the Ohio Supreme Court of its constitutional jurisdiction to grant Petitioners a discretionary appeal and sustain summary judgments in favor of the State and its political subdivisions, when the law of the State holds that guardrail accidents are issues of fact. See Adkins v Village of Ontario, supra. Even if the Court had taken jurisdiction, it would have to dismiss Petitioners' case as having been improvidently granted for lack of jurisdiction, after Petitioners' issues were mooted.

That arbitrary power is and was coupled with the

State's denial to Petitioners of the legal right of standing to challenge Respondents usurpation of the judicial power of the State in its Courts, that stems from their ultra vires legislative acts. This denial of standing was operative both under State law in Petitioners' original tort action against the State, and Petitioners' § 1983 federal law action against the Respondents also litigated in the State Courts.

That arbitrary power denies Petitioners of their fundamental substantive and procedural rights under Ohio's Constitution, Article I § 16, and the State enabling statutes, as well as the fundamental substantive and procedural rights under U.S. Constitution's 14th Amendment, Due Process & Equal Protection clauses, Article I § 10, and the Separation of Powers doctrine.

The State's over arching arbitrary power violates the rules of fundamental fairness. Ohio's Constitution Bill of Rights, Article I § 16, authorizes suits against the State by those it serves. The State statutorily has consented to be sued and has statutorily agreed to adjudicate Petitioners' case against the State filed in the Court of Claims in accordance with the rule of law applicable to suits between private parties.

The State's retention and use of the power to alter the applicable statutes by which it may be found liable, by ultra vires means, and apply case law decided in the context of State sovereignty, to an adjudication of Petitioners' case against the State, is not only contrary to Ohio's Constitution and its enabling statutes, but is beyond adjectival dimension and has created and will continue to create constitutional torts of great magnitude.

This case not only raises important issues concerning the rights of individuals and the power of State legislatures, it implicitly presents the issue of the restoration of the judicial integrity of the Ohio Supreme Court as being the final arbiter of the law of Ohio. That Court is being

confronted with the continued usurpation of its judicial authority by the incumbent Respondents' enactment of S.B. 108's remedial, reviving legislation, enacted in July 2001. Its avowed purpose is to revive the statutory status quo existing prior to Am.Sub.H.B. No. 350, having been declared unconstitutional *in toto, inter alia.*, by violating the Ohio Constitution's one subject rule. It is a continuation of that usurpation of judicial authority because it revived about the same number of statutes in S.B. 108, that were initially declared unconstitutional *in toto,* in Sheward, supra. S.B. 108's nexus to Am.Sub.H.B. No. 350 as remedial, reviving legislation is plain. S.B. 108 defies the Court's original adjudication that Am.Sub.H.B. No. 350. It violates the one subject rule of Ohio's Constitution.

Sheward, supra, itself, requires special standing to attack ultra vires legislation for usurpation of judicial authority for which Petitioners are legally disqualified. Thus the Ohio Supreme Court is and was prohibited from considering in Petitioners' Motion for Reconsideration § 1983, legal argument for a discretionary appeal, that S.B. 108 unconstitutionally mooted Petitioners' case by continuing to usurp the State's judicial authority and constituted ultra vires legislation.

Petitioners right to make that challenge is a fundamental, substantive, and procedural Due Process & Equal Protection right under U.S. § 1, 14th Amendment that should have been validated and recognized by the Ohio Supreme Court in Petitioners' § 1983 case, notwithstanding that ultra vires acts by State officers are statutorily and judicially actionable only in quo warranto by the Attorney General. The presumption of regularity presumes, that the Court will protect its judicial integrity at its first opportunity but could not because of Petitioners' lack of legal standing. .

It is of national importance for this Court to settle the issue of whether the unknown party Respondent, Lobbyists

and their Principals may be held liable by Petitioners in their § 1983 case as joint tortfeasors. These unknown party Respondents may have procured or sought this legislation that usurps the judicial authority of the State, and/or engaged in "no fault lobbying" by obtaining a "no fault" commitment from the state legislator Respondents not to remediate the legislation if it failed to pass constitutional muster, notwithstanding the Lobbyists' and their Principals' have First Amendment rights to petition their government.

This constitutional issue is a matter of first impression and impacts upon the constitutional issue of money as speech, which has contributed to suborning the integrity of our government. It is present as an issue of national importance to be decided in this case when the Attorney General declined to answer Petitioners' interrogatories seeking the identities of unknown, party defendants, John Does I, II, and III. It is additionally significant as an issue to be decided by this Court because the State was unconstitutionally, partially divested of its police power delegated to its municipalities in R.C. § 723.01 immediately following the Sheward decision, supra. If Petitioners' contentions are correct about S.B. 108, that police power is still unconstitutionally divested.

Respectfully, the lack of clear judicial authority on the subject matter of this suit from this Court has placed in doubt, as to what branch of government is the final arbiter of the law. That doubt has thus far forestalled resolution of Petitioners' case by the appropriate legal application of judicial estoppel, and the Courts' below use of their inherent judicial contempt power, necessary not only to vindicate the usurpation of the state's judicial authority, but also Petitioners' 42 U.S.C. § 1983 case as well.

Petitioners and the State have been damaged by Respondents' ultra vires legislative actions. The unknown Respondents,' John Doe's I, II & III may be complicit with

Respondents. Nowhere is there any attempt or gesture by the Attorney General to recover those damages by exercising the State's corporate right of indemnification from the Respondents, its agents, and those that may have acted in concert with them, as the unidentified Respondent Lobbyists and their Principals. Does not the State judiciary, as part of Petitioners' § 1983 case, when remedial legislation is not enacted forthwith, suggesting "no fault lobbying", have the duty to invoke its contempt power to vindicate the Court's authority and recover the damages from those causing the degradation of the Court's authority?

Usurpation of the judicial power of the State by legislation is a serious State corporate mischief requiring immediate repair because no adequate remedy at law for the State or for the Petitioners presently exists, unless this Court makes one. Significant unresolved 42 U.S.C. § 1983, state statutory and judicial issues emanating therefrom, and presented in this case, are of public importance and great general interest of the highest order, and are yet to be addressed or settled by this Court.

The Appellate Court's decision has place the Respondents back into the sphere of legitimate legislative activity. That Court treats ultra vires legislative acts the same as if they were unconstitutional legislative acts. That legal position moots the issue of delegated constitutional authority by which State government is premised upon. When that goes, we no longer have a government of laws but a government of persons, who with their immunity cannot be held accountable.

The State's right to legislate is limited by constitutional limitations. Munn v. People of Illinois, 94 US 113, 24 L Ed 77 (1877) states at p. 87:

> "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself,

> as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations."

That whim does not lawfully extend of the usurpation of judicial authority of the State or to a continuation thereof.

Petitioners' were wrongfully deprived of their vested property right in their wrongful deaths and personal injury actions against the State by the ultra vires legislative actions of the Respondents. Martinez v. California, 444 U.S. 277, at pgs. 281-282 (1980) and Logan v. Zimmerman Brush Company, 455 U.S. 422 at pg. 429 FN4, (1982). Thus far, Petitioners have been unable to redeem the vested rights they have been deprived of either against the State or Respondents

Respectfully, this Honorable Court should grant Petitioners a writ of certiorari, because the State in adjudicating Petitioners' § 1983 case has co-opted the Respondents' ultra vires act of usurping the judicial power of the State. The State co-opted by aligning itself with the unknown party defendants, Respondents John Does I, II, and III; by the Attorney General appearing on behalf of the State in defense of the Respondents' adjudicated ultra vires act in Sheward as if their ultra vires act is an authorized act of the State; by having its Courts condone Respondents ultra vires act as a legitimate legislative act to which absolute immunity is a complete defense entitling Respondents to summary judgment in their favor; and by judicially departing from settled federal law in adjudicating Petitioners' § 1983 attempt to vindicate their civil rights in this action, contrary to the Supremacy clause of the U.S. Constitution when the State judiciary are sitting as federal judges in that adjudication.

Petitioners plainly sued Respondents in their individual capacity following the Sheward decision, supra.

See the caption in the complaint in Apdx. O at pg. 91. The Attorney General appeared generally on behalf of the State by filing Respondents' answers to Petitioners' complaint, without filing a motion to intervene, as required by Ohio Civil Rule 24. Nor did the Attorney General reserve the state's sovereignty in the answers filed on behalf of Respondents in the Common Pleas Court. Petitioners lost these issues in the Courts below.

When Respondents are sued in their individual capacity for their adjudicated ultra vires acts in a § 1983 action and they are defended by the Attorney General with a general appearance on behalf of the State, the issue of national significance arises and is presented in this case, as to whether the State under these circumstances has become a party to Petitioners' 42 U.S.C. § 1983 case and subject to its liability, by waiver or otherwise, though a state, thus far, is not a person under § 1983 as a matter of law?

The State in this litigation has successfully nullified, Petitioners' First Amendment "speaking remedy" to vote the Respondents out of office as authorized by this Court in Bogan v. Scott Harris, 523 U.S. 44 (1998). It was condoned by the Court of Appeals. Petitioners deserve a writ for certiorari on this issue because the voidable summary judgment opinion effectively silenced Petitioners and their counsel at a relevant time when they were entitled to and needed the speaking remedy authorized by this Court to alert the citizenry.

The Sheward Court found its judicial authority usurped by legislation. In Petitioners case against this ultra vires legislative power, the same judiciary followed an apparent policy of condonation by ignoring the usurping of its judicial power asserted in Petitioners' argument in their Motion for Reconsideration, Apdx R pg. 140, that S.B.108 constitutes a continuation of the usurpation of the judicial power the State.

The Attorney General's statutory duty to defend Respondents, sued in their individual capacity arises under R.C. § 109.02. It requires any state officer sued in a civil case to be represented exclusively by the Attorney General. This statute has been amended since this Court's 1991 decision in Hafer v. Melo, Jr., 502 U.S. 21, supra. The Respondents' omission to create an exception for those senior officers sued in their individual capacity is really another usurpation of the judicial authority of this Court.

Hafer, supra, authorizes § 1983 suits against state officers sued in their individual capacity with the proviso that no state treasury money shall be used. With the State's Attorney General statutorily compelled to defend Respondents, State money is necessarily used for their defense, contrary to Hafer, supra. Secondly, any judgment Petitioners may obtain against the individual Respondents is subject to the defense, that Respondents were deprived of their Due Process constitutional right to select their own counsel, making any judgment against them voidable.

Petitioners' initial motion to strike the answers of the Attorney General based upon Hafer v. Melo, Jr., supra, was denied by the Common Pleas Court. It was raised as an assignment of error in the Court of Appeals but unaddressed in the Court's opinion, contrary to its regular procedure. Respectfully, that Court's financial dependence on the General Assembly for funding disqualifies it as a neutral adjudicator in a case such as this. Only this Court is sufficiently financially independent to dispense Due Process to Petitioners, should their case qualify for a writ.

The Respondents usurped the judicial authority of the State in October of 1996. by their enactment of Am.Sub.H.B. No. 350. The Ohio Supreme Court, in August of 1999 decided it in Sheward, supra. The judicial authority remained usurped without remedial legislation until July 2001 when S.B. 108 was enacted. S.B. 108's remedial,

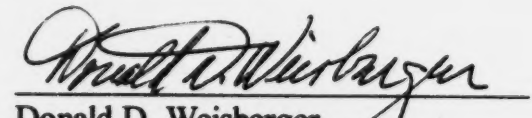
revival legislation in one bill, because of its nexus to Am.Sub.H.B. No. 350, which it is intended to remedy, plainly continues the original usurpation of the judicial authority, by violating of the one subject rule of the Ohio Constitution adjudicated in Sheward, supra. It is not unreasonable to conclude that S.B. 108, at a minimum, places a serious cloud over those that are to be governed by the rule of law. When the one subject rule can be so easily managed legislatively by a series of small enactments, the appearance of S.B. 108 suggests a purposeful act that ratifies the facially masked original intent to usurp that resulted in Sheward, supra.

Without this Court's intervention by granting a writ of certiorari, the State is permitting, and will continue to permit into the indefinite future, the tort law of the State to be controlled by the usurpation of judicial power, denying not only Petitioners, but all Ohio litigants, Due Process and Equal Protection of the law under the 14th Amendment to the U. S. Constitution.

CONCLUSION

Respectfully, Petitioners therefore pray that their petition for writ of certiorari be granted.

Dated this 4th day of March, 2002.

By: 

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